U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: OCT 3 1 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a staffing company. It seeks to employ the beneficiary permanently in the United States as a nurse supervisor pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). Upon reviewing the petition, the director determined that the beneficiary did not meet the job qualifications stated on the labor certification. Specifically, the director determined that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date. The director also determined that the petitioner did not establish that permanent employment was prearranged for the beneficiary at the time of filing the immigrant visa petition. The director found that the petitioner would not be the beneficiary's actual employer.

On appeal, counsel submits a brief and a new employment letter.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.*

The regulation at 8 C.F.R. § 204.5(k)(4) states, in pertinent part, that "[t]he job offer portion of an individual labor certification, Schedule A application . . . must demonstrate that the job requires a professional holding an advanced degree . . . ."

The beneficiary possesses a Bachelor of Science in Nursing from the Philippines. The record contains a registered nurse CGFNS certificate for the beneficiary issued on September 13, 2007 and a California card of registered nursing that expired on

April 30, 2013. The record also contains employment letters from the The issue in this case is whether the beneficiary's degree and experience constitute a foreign degree equivalent to a U.S. baccalaureate degree.

Schedule A

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA Form 9089 in duplicate. *See* 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15.

If the Schedule A occupation is for a professional nurse, the petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); or a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2).

Petitions for Schedule A occupations must also contain evidence establishing that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (posting notice) as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. *See* 20 C.F.R. § 656.15(b)(2).

For the posting notice requirement, the employer must provide notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The regulation at 20 C.F.R. § 656.10(d)(3) states that the posting notice shall:

(i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
(ii) State that any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
(iii) Provide the address of the appropriate Certifying Officer; and
(iv) Be provided between 30 and 180 days before filing the application.

Posting notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6).

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the ETA Form 9089, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an ETA Form 9089 is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith,* 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the ETA Form 9089 application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the ETA Form 9089 that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the ETA Form 9089.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

H.4. Education: Bachelor's degree.
H.4-B Major field of study: [blank].
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: Master's degree and no experience.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: [blank].
H.14. Specific skills or other requirements: Five years of experience as a nurse and/or master's degree in nursing.

The ETA Form 9089 also states that the beneficiary qualifies for the offered position based on experience as a registered nurse with Florida from April 13, 2010 until June 13, 2012, the date that the beneficiary signed the ETA Form 9089. The ETA Form 9089 states that the beneficiary qualifies for the offered position based on experience as a registered nurse with Philippines from May 16, 2006 until January 2010. No other experience is listed. The ETA Form 9089 lists no experience in the job offered as a nursing supervisor. The beneficiary signed the ETA Form 9089 under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(G)(1)) states:

> *General.* Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. In general, ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval. However, at the discretion of the director, original documents may be required in individual cases. Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains an experience letter from Manager, Sales and Recruitment, on letterhead stating that the company employed the beneficiary as a registered nurse from February 16, 2011 until at least June 18, 2012, the date that the letter was written. The dates of employment claimed in the letter from cannot be reconciled with the dates of employment listed on the Form 9089 for in Florida. No explanation is provided as to how the beneficiary could work in Maryland from

February 16, 2011 to June 18, 2012, while also working in Florida from April 13, 2010 to June 13, 2012.[2] It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Additionally, the letter from describes the beneficiary's employment as a registered nurse and not as a nursing supervisor, as required by the ETA Form 9089.

The record also contains an experience letter from on letterhead stating that the company employed the beneficiary as a staff registered nurse from April 13, 2010 to February 15, 2011. The letterhead for lists an address in Florida. The ETA Form 9089 does not list as an employer. However, the starting date for the beneficiary's employment with is the same as the starting date listed for on the ETA Form 9089. Although the starting dates match, the ETA Form 9089 signed by the beneficiary on June 13, 2012 lists the end date on the ETA Form 9089 as "present." The employment dates for are inconsistent. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* Further, the employment was as a registered nurse and not as a nursing supervisor.

The director stated in his decision that the employment letters in the record indicated that the beneficiary had 26 months of experience as a registered nurse and that the record did not contain a letter from On appeal, counsel submits an employment letter from

[2] The petitioner has filed a second petition on behalf of the instant beneficiary and that petition is currently pending. The ETA Form 9089 submitted with that petition lists the beneficiary's employment history as follows: with as a registered nurse from July 2012 to October 2012; with as a registered nurse from February 16, 2011 to July 2012, and; with as a registered nurse from April 13, 2010 to February 15, 2011. The petitioner also submitted an experience letter dated November 19, 2012 from The letter lists the beneficiary's dates of employment as July 31, 2012 to October 12, 2012. No explanation for the discrepancy in the dates of employment listed on the instant Form 9089 and the subsequent petition and experience letter is provided. An experience letter dated November 30, 2012 from Manager, was also submitted. This letter lists the beneficiary's dates of employment as February 16, 2011 to July 31, 2012. No explanation for the discrepancy in the dates of employment listed on the instant Form 9089 and experience letter and the subsequent petition is provided.

The record contains an experience letter from M.D., Medical Director, on letterhead stating that the company employed the beneficiary as an Intensive Care Unit/Coronary Care Unit Staff Nurse from May 16, 2006 to November 11, 2009, the date the letter was signed. The AAO notes that the title and duties listed on Dr. letter are different than those listed on the ETA Form 9089. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* Further, the experience listed in the letter is not as a nursing supervisor, as required by the ETA Form 9089.

The evidence of record also does not establish that the beneficiary is able to perform the job duties of the offered position. The record contains a copy of the beneficiary's California registered nursing license that expired on April 30, 2013. The AAO notes that the place of intended employment is Utah and the record contains no Utah registered nursing license for the beneficiary. Further, the petitioner has not established reciprocity between California and Utah. Although Utah is a member of the California is not currently a member of the and therefore a California resident is not eligible for a

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the ETA Form 9089 as of the priority date. Therefore, the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act.

The director also determined that the petitioner had not demonstrated that it would be the beneficiary's actual employer. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under…section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In this case, the petitioner has failed to establish what company would actually employ the beneficiary. The petitioner describes itself as a staffing company. The petitioner submitted contracts with The director issued a notice of intent to deny (NOID) noting that the petitioner had failed to establish that permanent employment was prearranged at the time of filing the petition and that this cast doubt on the petitioner's intent to

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permanently employ the beneficiary. In response to the NOID, the petitioner submitted an employment agreement dated October 23, 2012, four months after the petition was filed. On appeal, counsel asserts that the filing of the petition was the agreement for employment.

The AAO has reviewed the contracts with Neither contract lists nurse supervisor as a position, nor do the contracts include details on work location. The petitioner has not provided an explanation as to how either contract relates to the beneficiary or the offered position of Nurse Supervisor. The AAO has also reviewed the employment agreement between the petitioner and the beneficiary. The employment agreement states that the petitioner is a "registered, bonded and licensed health care service firm in and " The agreement states that the employee must be a registered nurse in The agreement makes no mention of work or licensing in Utah, the work location listed on the ETA Form 9089, prevailing wage determination and posting notice. The agreement lists the employee's title as registered nurse, and not as nurse supervisor, as listed on the petition and supporting documents. The agreement further states that the petitioner may assign the agreement to its successors and assignees. The petitioner presents no new evidence of its intent to permanently employ the beneficiary. Upon review of the contracts and employment agreement, the petitioner has failed to demonstrate its intent to permanently employ the beneficiary according to the terms of the petition. Therefore, the petition must also be denied because the petitioner failed to establish that it will actually employ the beneficiary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.